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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/829,168	04/09/2001	Allan J. Lepine	IAM 0498 NA	1328

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EXAMINER	
CORBIN, ARTHUR L	
ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 10/31/2003

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 09/829,168	Applicant(s) LEPINE
	Examiner ARTHUR L. CORBIN	Group Art Unit 1761

—The MAILING DATE of this communication appears on the cover sheet beneath the correspondence address—

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, such period shall, by default, expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

☒ Responsive to communication(s) filed on 4-29-01.

☐ This action is **FINAL.**

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle,* 1935 C.D. 1 1; 453 O.G. 213.

Disposition of Claims

☒ Claim(s) 1 & 3-12 is/are pending in the application.

Of the above claim(s) _____ is/are withdrawn from consideration.

☐ Claim(s) _____ is/are allowed.

☒ Claim(s) 1 & 3-12 is/are rejected.

☐ Claim(s) _____ is/are objected to.

☐ Claim(s) _____ are subject to restriction or election requirement

Application Papers

☐ The proposed drawing correction, filed on _____ is ☐ approved ☐ disapproved.

☐ The drawing(s) filed on _____ is/are objected to by the Examiner

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119 (a)–(d)

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119 (a)–(d).

☐ All ☐ Some* ☐ None of the:

☐ Certified copies of the priority documents have been received.

☐ Certified copies of the priority documents have been received in Application No. _____.

☐ Copies of the certified copies of the priority documents have been received in this national stage application from the International Bureau (PCT Rule 17.2(a))

*Certified copies not received: _____.

Attachment(s)

☒ Information Disclosure Statement(s), PTO–1449, Paper No(s). _____

☐ Interview Summary, PTO–413

☐ Notice of Reference(s) Cited, PTO–892

☐ Notice of Informal Patent Application, PTO–152

☐ Notice of Draftsperson's Patent Drawing Review, PTO–948

☐ Other _____

Office Action Summary

1. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

3. Claims 1 and 3-5 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over the admitted prior art from pages 1 and 5 of grandparent application, SN 09/163,778.

The appellant admits in the specification that naturally occurring beagle milk contains various components, including 40.40% protein, 31.8% fat, 18.5% carbohydrate, and a case-in/whey ratio of 70.30 (specification, page 5, lines 21-26). The specification also admits that it is "generally accepted that milk from the lactating mother provides optimal nutrition to the suckling puppy. Accordingly, milk replacers currently in use have been formulated with the intent of matching the nutrient composition of bitch milk" (Id., page 1, lines 8-11).

Since naturally occurring canine milk contains all of the elements of instant claim1, it can be concluded that naturally occurring canine milk clearly anticipates the subject matter of claim 1.

In the alternative, given the known desired formulation of milk replacers to closely match the nutrient composition of canine milk, it would have been obvious to one of ordinary skill in the art to formulate a milk replacer with the composition of claim 1 to match the components of the natural beagle milk.

Claims 3-5 are similarly clearly anticipated and/or obvious within the meaning of 35 USC §102(b) and/or 103(a) as follows.

Instant claim 3 recites "about 38% protein." Natural beagle milk contains 40.40% protein (specification, page 5, lines 21-26), which clearly anticipates a composition containing "about 38%" protein. In the alternative, it would have been obvious to formulate a canine milk replacer, which contains about 38% protein, as it was known to formulate milk replacers to match the content of natural milk.

Instant claim 4 recites "about 28% fat." Natural beagle milk contains 31.8% fat (specification, page 5, lines 21-26), which clearly anticipates a composition containing "about 28%" fat. In the alternative, it would have been obvious to formulate a canine milk replacer, which contains about 28% fat, as it was known to formulate milk replacers to match the content of natural milk.

Instant claim 5 recites "about 19% carbohydrates." Natural beagle milk contains 18.5% carbohydrates (specification, page 5, lines 21-26), which clearly anticipates a composition containing "about 19%" carbohydrates. In the alternative, it would have been obvious to formulate a canine milk replacer, which contains about 19% carbohydrates, as it was known to formulate milk replacers to match the content of natural milk.

4. Claims 7-9, 11 and 12 are also rejected under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art as set forth in paragraph No. 3 above.

Although the claimed ranges in claims 7-9, 11 and 12 are not specifically exemplified or analyzed for in the Admitted Prior Art beagle milk, the compositions of the claimed milk replacer and the prior art beagle milk are so close (and stated to be modeled upon natural beagle milk) that they are reasonably expected to behave in the same or similar manner. Compare Titanium Metals Corp. v. Banner, 778 F.2d 775, 783, 227 USPQ 773, 779 (Fed. Cir. 1985).

Where general conditions of the appealed claim are disclosed in the prior art, it is not inventive to discover optimum or workable ranges by routine experimentation, and appellant has the burden of proving any criticality. In re Boesch, 617 F.2d 272, 276, 205 USPQ 215, 218-219 (CCPA 1980); In re Aller, 220 F.2d 454, 456, 105 USPQ 233, 235 (CCPA 1955). The appellant has not done so with the claimed compositions vis-à-vis natural beagle milk.

5. Claim 6 is rejected under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art as applied to claims 1, 3-5, 7-9, 11-12 above, and further in view of Gil et al (5,709,888).

The admitted to prior art is as discussed above. Gil et al teaches that a preferred source of fat for a human milk replacer includes an oil such as corn oil (column 10, line 64). Gil et al also experimentally teaches feeding weanling rats (column 24, line 59 et seq.) from its example 13. Example 13 and example 4a contain the same fat mixtures,

and example 4a is said to contain arachidonic and docosahexaenoic acid, with beneficial effect on the rats (column 17, lines 40-58).

Consequently, it would have been obvious to utilize corn oil, arachidonic acid, or docohexaenoic acid as a fat source in the instantly claimed canine milk replacer of claims 6 and 14 to obtain the beneficial effects found in humans and rats.

6. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over the admitted prior art as applied to claims 1, 3-5, 7-9, 11-12 above, and further in view of Fujimori (5,294,458).

The Admitted Prior Art is as discussed above. The Admitted Prior Art (specification, page 7, lines 16-22) further states that 0.50% FOS is known to improve the intestinal health of "many animals." Accordingly, it would have been obvious to incorporate the FOS into the claimed composition.

Alternatively, Fujimori teaches that fructooligosaccharides are known to be in pet foods to reduce objectionable odors in pet wastes (see, e.g. Fujimori, column 2, lines 45 et seq.). The lactosucrose is utilized in an amount of 0.25 parts by weight (column 6, lines 25-26). Accordingly, it would have been obvious to use the fructooligosaccharide in the canine milk replacer to obtain the known benefits.

7. Claims 1 and 9 are also rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Meyer (EP 0,259,713).

Meyer discloses feeding dogs an artificially produced canine milk substitute including 1-25% lactose (a carbohydrate), at least 25% fat, 30% protein composed of casein and whey wherein the ratio of casein to albumin-globulin (whey protein) may be

5.0 to 2.1 amino acids and fatty acids. Any differences that may exist between applicant's artificial canine milk substitute and that of Meyer are deemed to be obvious.

8. Claims 3-5, 11 and 12 are also rejected under 35 U.S.C. 103(a) as being unpatentable over Meyer.

Finding the optimum amount of each component would require nothing more than routine experimentation by one reasonably skilled in this art.

9. Claim 6 is also rejected under 35 U.S.C. 103(a) as being unpatentable over Meyer as applied to claims 1 and 9 above, and further in view of Gil et al.

Gil et al is applied as in paragraph No. 5 above.

10. Claim 10 is also rejected under 35 U.S.C. 103(a) as being unpatentable over Meyer as applied to claims 1 and 9 above, and further in view of Fujimori.

Fujimori is applied as in paragraph No. 6 above.

11. The disclosure is objected to because of the following informalities: The current status of the parent and grandparent applications should be updated on page 1 of the spec. under "Cross Reference to Related Applications."

Appropriate correction is required.

12. Any inquiry concerning this communication from the examiner should be directed to Arthur Corbin whose telephone number is (703) 308-3850. The examiner can generally be reached on Tuesday--Friday from 10 a.m. to 7:30 p.m. and on alternate Mondays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on (703) 308-3959. The fax phone numbers

for the organization where this application is assigned are (703) 872-9310 for regular communications and (703) 305-7115 for After Final communications.

Any inquiry of a general nature or relating to the status of this application should be directed to the receptionist whose telephone number is (703) 308-0661.

A. Corbin/dh
October 29, 2003

ARTHUR L. CORBIN
PRIMARY EXAMINER
10-29-03